IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BARBARA TUTOLO	:	CIVIL ACTION
	:	
v.	:	
	:	
INDEPENDENCE BLUE CROSS	:	NO. 98-CV-5928

MEMORANDUM AND ORDER

J. M. KELLY, J. **MAY 5, 1999**

Presently before the Court is Defendant Independence Blue Cross's ("IBC") Motion to Dismiss. For the reasons that follow, Defendant's motion is granted in part as to Count II of the Complaint and granted as to Counts III and IV.

I. BACKGROUND

Plaintiff Barbara Tutolo is insured by Defendant through her employer. For many years Plaintiff has suffered from a variety of cardiac problems that have persisted despite attempts to treat those conditions with medication. Because of these problems, Plaintiff visited Dr. David Callans, a cardiology specialist, in late 1997. Due to her age (Plaintiff is twenty-seven) and the potential for complications from prolonged treatment with medication, Dr. Callans recommended that Plaintiff undergo a cardiac ablation procedure. Dr. Callans requested pre-approval for this procedure from Defendant, which denied this request. Plaintiff alleges she asked for copies of the guidelines Defendant used to reach its conclusion and its appellate procedures, but that Defendant failed to provide her with this documentation. Plaintiff further alleges Defendant has failed to follow the appellate process stated in her contract. Plaintiff has sued Defendant for, among other things, injunctive relief compelling Defendant to approve the procedure. Defendant now moves to dismiss several of Plaintiff's claims.

II. DISCUSSION

A. The Rule 12(b)(6) Standard

In considering whether to dismiss a complaint for failing to state a claim upon which relief can be granted, the court must consider only those facts alleged in the complaint and must accept those facts as true. Hishon v. King & Spalding, 467 U.S. 69, 73 (1983). Moreover, the complaint is viewed in the light most favorable to the plaintiff. Tunnell v. Wiley, 514 F.2d 971, 975 n.6 (3d Cir. 1975). In addition to these expansive parameters, the threshold a plaintiff must meet to satisfy pleading requirements is exceedingly low: a court may dismiss a complaint only if the plaintiff can prove no set of facts that would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). As the court describes below, Defendant substantially has met this rigorous standard.

B. Plaintiff's ERISA Claim

Defendant first moves to dismiss Count II of Plaintiff's Complaint. In that count, Plaintiff alleges Defendant is liable to her for statutory damages because Defendant failed to provide her with documentation she believes she is entitled to under 29 U.S.C. § 1024(b)(4), which requires employee health benefit plan administrators, when requested, to furnish contracts and "other instruments under which the plan is established or operated" to plan participants. A plan administrator that fails to comply with this provision is liable to the plan participant. Id. § 1232(a)(1)(A). Defendant argues it is not liable for two reasons: first, Plaintiff never alleged it is a "plan administrator" in the Complaint; and second, even if it is a plan administrator, Defendant is not obligated under § 1024(b)(4) to provide the documents Plaintiff seeks.

The Court will grant Defendant's motion, but only in part. Plaintiff has alleged

Defendant was a plan administrator in its Amended Complaint, and thereby has mooted Defendant's first argument. With respect to its second argument, Defendant is partially correct: it is not required to produce everything Plaintiff requests, but Plaintiff still has stated a claim on which relief may be granted. Section 1024(b)(4) requires plan administrators to produce copies of plan contracts upon request, and because Plaintiff alleges she asked for a copy of the contract and Defendant failed to provide it to her, she has stated a claim sufficient to avoid dismissal. Plaintiff also seeks documents detailing Defendant's appellate hearing procedures and describing the criteria Defendant used when deciding to deny approval for the ablation procedure, but both of these documents fall outside of what § 1024(b)(4) requires. The language of that provision must be narrowly construed to encompass only those documents that specifically relate to how the plan is set up or managed. Ames v. American Nat'l Can Co., 170 F.3d 751, 758-59 (7th Cir. 1999); Board of Trustees v. Weinstein, 107 F.3d 139, 144 (2d Cir. 1997) (restricting "instruments" under § 1024(b)(4) to a plan's formal legal documents); Faircloth v. Lundy Packing Co., 91 F.3d 648, 651-52 (4th Cir. 1996), cert. denied, 117 S. Ct. 738 (1997); Hughes Salaried Retirees Action Comm. v. Administrator of the Hughes Non-Bargaining Retirement Plan, 72 F.3d 686, 689-91 (9th Cir. 1995) (en banc), cert. denied, 517 U.S. 1189 (1996). Following these persuasive authorities, the Court finds Defendant is not required to comply with these other requests. Cf. Doe v. Travelers Ins. Co., 167 F.3d 53, 59-60 (1st Cir. 1999) (finding the plaintiff was not entitled to receive the guidelines based upon which the defendant denied payment for psychiatric care).

C. Plaintiff's Bad Faith Claim

Defendant next moves to dismiss Plaintiff's bad faith claim, brought pursuant to 42 Pa.

Cons. Stat. Ann. § 8371 (West 1997), arguing Plaintiff's claim is preempted by ERISA. Congress broadly drafted ERISA to preempt any state laws that "relate to" employee benefit plans, 29 U.S.C. § 1132(a), but exempted those state laws that "regulate insurance" from ERISA preemption, id. § 1144(b)(2)(A). The parties here agree Pennsylvania's bad faith law "relates to" employee benefit plans and therefore falls within ERISA's preemption clause, but disagree about whether the bad faith law regulates insurance according to the Supreme Court's test in Pilot Life v. Dedeaux, 481 U.S. 41 (1987). Under that test, reviewing courts first should take a "common-sense view" of the exemption, and then should confirm that view by reference to whether the state law fits within the "business of insurance," as that phrase is understood in relation to the McCarran-Ferguson Act, 15 U.S.C. § 1011 (1994). Unum Life Ins. Co. v. Ward, No. 97-1868, 1999 WL 224560, at *7 (U.S. April 20, 1999). The factors courts should consider in the latter inquiry are: (1) whether the practice the state law regulates has the effect of spreading or transferring a policy holder's risk; (2) whether the practice is an integral part of the policy relationship between the insurer and the insured; and (3) whether the practice is limited to entities within the insurance industry. Pilot Life, 481 U.S. at 48-49 (quoting Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 129 (1982)).

The Court finds Pennsylvania's bad faith law does not fall within ERISA's preemption exemption and will grant Defendant's motion to dismiss this claim. The bad faith law does not serve to transfer or spread the policy holder's risk; it provides the policy holder with a remedy against the insurer. See Clancy v. Insurance Co. of Am., No. 96-1053, 1996 WL 543929, at *3 (E.D. Pa. Sept. 24, 1996). Further, the bad faith statute is not an integral part of the insurer-insured relationship, but is a resort to which the insured may turn when injured by its relationship

with its insurer. See Pilot Life, 481 U.S. at 51 (involving Mississippi's common-law cause of action for bad faith). Pennsylvania's bad faith law, therefore, fails to meet the "business of insurance" test and is preempted by ERISA. Cf. Reilly v. Keystone Health Plan East, Inc., No. 98-CV-1648, 1998 WL 422037, at *3 (E.D. Pa. July 27, 1998); Asprino v. Blue Cross & Blue Shield Assoc., No. 96-7788, 1997 WL 255675, at *2 (E.D. Pa. May 8, 1997); Balush v. Independence Blue Cross, No. 96-7303, 1996 WL 741960, at *2 (Dec. 17, 1996); Ruth v. Unum Life Ins. Co. of Am., No. 94-3969, 1994 WL 481246, at *4-*5 (E.D. Pa. Sept. 6, 1994); Northwestern Inst. of Psychiatry v. Travelers Ins. Co., No. 92-1520, 1992 WL 331521, at *3 (E.D. Pa. Nov. 3, 1992).

D. Plaintiff's Federal Common Law Claim

Defendant finally moves to dismiss Count IV of Plaintiff's Complaint, in which she brings a claim for bad faith under the federal common law. Defendant argues that no federal court has recognized a federal common law cause of action for bad faith, and observes that federal courts routinely have declined to find other federal common law causes of action. Plaintiff argues the recognition of a bad faith claim under federal common law would vindicate rights of insureds the present application of ERISA effectively bars, and also points to an excerpt from a House of Representatives Budget Committee Report that apparently supports the creation of federal common law in the context of ERISA.

Federal courts may create federal common law, but may do so appropriately only in very limited circumstances. Congress intended that federal courts would create a federal common law when they found gaps in the rights and obligations established under ERISA. Teamsters Pension Trust Fund v. Littlejohn, 155 F.3d 206, 208 (3d Cir. 1998). Gaps in ERISA's remedies

provision, however, are not as pervasive as some litigants might suggest; Congress carefully crafted ERISA's civil enforcement provision, thereby making the possibility that Congress inadvertently omitted a remedy "especially suspect." See Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 146 (1985). Moreover, "the deliberate care with which ERISA's civil enforcement remedies were drafted and the balancing of policies embodied in its choice of remedies argue strongly for the conclusion that ERISA's civil enforcement remedies were intended to be exclusive." Pilot Life, 481 U.S. at 54. Notwithstanding the Supreme Court's strong language, Plaintiff encourages this Court to find Congress overlooked the remedy of punitive damages for bad faith.

The Court will decline Plaintiff's invitation. The unavailability of punitive damages does not appear to the Court to be a gap in ERISA's civil enforcement provision. Rather, that unavailability demonstrates Congress's considered refusal to add that remedy to those already provided in the thoughtfully drafted remedial scheme. Further, the Court already has found ERISA preempts the state bad faith claim. The Court will not find the federal common law, either under ERISA or outside it, can support substantially the same claim. Cf. Asprino, 1997 WL 255675, at *2. Defendant's motion to dismiss Count IV is granted.

An Order follows.

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ORDER

AND NOW, this 5th day of May, 1999, upon consideration of Defendant's Motion to Dismiss (Document Nos. 2 and 7), and Plaintiff's responses thereto, it is hereby **ORDERED**:

1. Defendant's motion to dismiss Count II of Plaintiff's Complaint is **GRANTED IN PART**, as it relates to Plaintiff's requests for the ablation criteria and appellate procedures; and

2. Defendant's motion to dismiss Counts III and IV of Plaintiff's Complaint is **GRANTED**.

BY THE COURT:

_____
JAMES McGIRR KELLY, J.